No. 91-7328

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

LEONEL TORRES HERRERA, PETITIONER

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF JUSTICE, INSTITUTIONAL DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

The United States will address the following question:

Whether the Cruel and Unusual Punishments Clause of the Eighth Amendment, or the Due Process Clause of the Fifth and Fourteenth Amendments, entitles a prisoner to obtain federal habeas corpus review of his conviction on the basis of newly discovered evidence.

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INTEREST OF THE UNITED STATES

This case concerns the proper disposition of a petition for a writ of habeas corpus in which a prisoner claims that newly discovered evidence proves his innocence. The Court's resolution of this case will affect the federal government. Rule 33, Fed. R. Crim. P., governs a defendant's claim that he is entitled to a new trial due to newly discovered evidence. Federal prisoners also can collaterally attack their convictions under 28 U.S.C. 2255. The United States also has participated as amicus curiae in other cases involving the scope of habeas corpus review. *E.g.*, *Sawyer* v. *Whitley*, No. 91-6382 (June 22, 1992); *Wright* v. *West*, No. 91-542 (June 19, 1992).

STATEMENT

1. At approximately 10:40 p.m. on September 29, 1981, the body of Texas Department of Public Safety Officer David Rucker was discovered along a highway 6.2 miles east of Los Fresnos, Texas. Officer Rucker had been killed by a gunshot wound to the head. There were no witnesses to the crime, but petitioner's social security card was discovered near the body. About ten minutes after the shooting, Los Fresnos police officer Enrique Carrisalez stopped for speeding a car traveling west from the point where Officer Rucker's body was found. Officer Carrisalez's headlights illuminated the driver's side of the stopped car. Officer Carrisalez radioed the driver's license number to the dispatcher before approaching the car. *Herrera* v. *State*, 682 S.W.2d 313, 316 (Tex. Crim. App. 1984), cert. denied, 471 U.S. 1131 (1985); *Herrera* v. *Collins*, 904 F.2d 944, 945-946, 948 (5th Cir.), cert. denied, 111 S. Ct. 307 (1990).

As Officer Carrisalez walked toward the car, the driver stepped toward the officer and fired one or more shots. One shot hit Carrisalez in the chest; he died nine days later from the wound. Enrique Hernandez, a civilian who had accompanied Officer Carrisalez that night, witnessed the shooting. Hernandez was about 15 feet from Officer Carrisalez's assailant, and, although he took cover for part of the time, he looked directly at the assailant for approximately 14 seconds. Hernandez saw Officer Carrisalez fire four shots as the other car sped away. 682 S.W.2d at 316; 904 F.2d at 946, 948.

Hernandez radioed a description of the suspect's automobile. Hernandez later went to a local police station and was shown six photographs. Hernandez selected three photographs and said that any one could have been the killer; petitioner's photograph was among the ones selected. While at the hospital, Officer Carrisalez identified petitioner from a mug shot. Over the course of the next few days, Hernandez again identified petitioner from the mug shot that had been shown to Officer Carrisalez, from

a second photographic display, and from a line-up. 682 S.W.2d at 316-317; 904 F.2d at 946.

Petitioner was arrested several days after the shooting. He had with him envelopes on which he had written a letter essentially admitting to killing Officer Carrisalez.[1] Other evidence also tied petitioner to the murders. 682 S.W.2d at 316; 904 F.2d at 946.[2]

2. Petitioner was convicted and sentenced to death for the capital murder of Officer Carrisalez.[3] Petitioner appealed his conviction and sentence to the Texas Court of Criminal Appeals, which affirmed. 682 S.W.2d 313 (1984), reh'g denied (Jan. 16, 1985). Petitioner argued, inter alia, that the pre-trial and in-trial identifications by Hernandez were unreliable and that Officer Carrisalez's identification should not have been admitted as a

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[1] "When an officer attempted to interrogate [petitioner, he] demurred that 'it was all in the letter' and suggested to police that they read a letter if they wanted to know what happened. He then invoked his Sixth Amendment right to counsel. Police then inventoried [petitioner's] belongings and located six envelopes upon which [he] had written a letter essentially admitting and offering an explanation for both police killings." 682 S.W.2d at 317; see 904 F.2d at 949 n.6 (referring to "a letter written by [petitioner] on the back of several envelopes in which he essentially admits to the killing of both officers"). The letter is reprinted at App. B, *infra*.

[2] Local law enforcement officers who knew petitioner concluded that the description of the suspect and automobile matched him and a car he was known to drive. The officers obtained an arrest warrant for petitioner and went to his house. There, the officers found the car, but not petitioner. Although the car was registered to petitioner's girlfriend, she did not own a set of keys for the car. Moreover, petitioner's girlfriend told the police that petitioner drove the car and that she had not seen the car since early in the morning before the shooting, when petitioner took the car. Finally, the car keys were found in petitioner's pants when he was arrested. Blood was found on the left side of petitioner's car, the driver's seat, and the floorboard. Forensic tests showed that the blood was the same type as Officer Rucker's and differed from petitioner's. 682 S.W.2d at 316-317, 321.

[3] Petitioner later pleaded guilty to the murder of Officer Rucker. J.A. 4.

dying declaration. The court rejected those claims, and this Court denied certiorari. 471 U.S. 1131 (1985).

3. Petitioner next filed an application for a writ of habeas corpus in state district court. The court denied relief, and the Texas Court of Criminal Appeals affirmed. *Ex parte Herrera*, No. 12,848-02 (Tex. Crim. App. Aug. 2, 1985).

Petitioner thereafter filed a petition for a writ of habeas corpus in federal district court. Petitioner again claimed that the identifications made by Hernandez and Officer Carrisalez were unreliable. The district court rejected that claim and denied the petition. *Herrera* v. *McCotter*, No. B-85-343 (S.D. Tex. Oct. 23, 1989). The Fifth Circuit affirmed. 904 F.2d 944 (1990). This Court again denied certiorari. 111 S. Ct. 307 (1990).

4. Petitioner filed a second habeas petition in state court. The court denied the application, finding that "no evidence at trial remotely suggest[ed] that anyone other than [petitioner] committed the offense." *Ex parte Herrera*, No. 81-CR-672-C (Tex. 197th Jud. Dist. Jan. 14, 1991); J.A. 10. The Texas Court of Criminal Appeals affirmed on the basis of the trial court's findings and conclusions. 819 S.W.2d 528 (1991), reh'g overruled (Sept. 18, 1991); J.A. 13-27.[4] This Court again denied certiorari. 112 S. Ct. 1074 (1992).

In the meantime, on February 18, 1992, petitioner filed his second federal habeas petition. His principal claim was that he did not murder Officer Carrisalez. Petitioner alleged that Officer Rucker, the Hidalgo County sheriff, petitioner's brother Raul Herrera, Sr., petitioner's father, and petitioner were all involved in drug trafficking; that Raul Sr. killed Officer Rucker in a disagreement over drug

[4] Two judges dissented from the decision to uphold petitioner's sentence, but not from the decision to uphold his conviction. 819 S.W.2d at 529-532 (Clinton, J., dissenting); *id.* at 528-529 (Maloney, J., dissenting).

trafficking; that Raul Sr. also killed Officer Carrisalez; and that law enforcement officers knew these facts, but did not disclose them to the defense before trial or sentencing, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Petition for a Writ of Habeas Corpus 25-27 (Feb. 18, 1992).

To support those allegations, petitioner submitted four affidavits. Three affiants alleged that Raul Sr., who was dead when the affidavits were filed, had admitted murdering Officer Carrisalez. Raul Jr., petitioner's nephew and (according to counsel for respondent) a fellow inmate, claimed to be an eyewitness to the murders, and said that Raul Sr., not petitioner, was responsible. Habeas Petition App. Exhs. 10-11, 15-16.[5]

[5] Raul Jr. alleged that he and one Chavello Lopez, a business partner and friend of Raul Sr.'s, were in petitioner's car with Raul Sr. on the night of the shootings; that Raul Sr. shot the officers; that petitioner was not involved in the shootings; that he told a police officer that his father, Raul Sr., not petitioner, shot the officers; that the officer told him to remain silent about the matter; and that petitioner's lawyers had not previously asked him about the case. Habeas Petition 30-31; *id.* App. Exh. 16. Petitioner also submitted an affidavit, dated December 11, 1990, from Hector Villareal, counsel for Raul Sr. Villareal alleged that in 1984, while he was representing Raul Sr. on a charge of attempted murder, Raul Sr. told him that he, not petitioner, had shot the officers; that Raul Sr., Officer Rucker, and the Hidalgo County sheriff were all involved in drug trafficking; that after petitioner was convicted Raul Sr. started blackmailing the sheriff, because the sheriff knew that petitioner was innocent; that Raul Sr. was murdered thereafter; and that, according to Villareal, Raul Sr. was murdered by one Jose Lopez, who also was involved in drug trafficking with the sheriff, to silence Raul Sr. Habeas Petition 31-33; *id.* App. Exh. 10. In another affidavit, one Juan Palacios alleged that, while he and Raul Sr. were in jail together, Raul Sr. confessed to him that he had murdered the officers. Habeas Petition 33-34; *id.* App. Exh. 11. Finally, in an affidavit dated January 3, 1991, one Jose Ybarra alleged that Raul Sr. spontaneously told Ybarra outside a bar one night during the summer of 1983 that he had murdered the officers. *Id.* App. Exh. 15.

The district court dismissed most of petitioner's claims as an abuse of the writ under *McCleskey* v. *Zant*, 111 S. Ct. 1454 (1991). The court ordered an evidentiary hearing on the *Brady* issue and on petitioner's claim that he did not murder Officer Carrisalez. The court stayed petitioner's execution pending the hearing. *Herrera* v. *Collins*, No. M-92-30 (S.D. Tex. Feb. 17, 1992); J.A. 28-53.[6]

Respondent appealed, and the Fifth Circuit vacated the stay of execution. 954 F.2d 1029 (1992); J.A. 59-69. The court found "disingenuous" petitioner's attempt to couch his actual innocence claim as a *Brady* violation, since there was no indication that the State had concealed evidence and since the evidence petitioner cited was equally available to him. J.A. 64. The court also ruled that petitioner's affidavits did not raise a substantial claim for relief. Relying on *Townsend* v. *Sain*, 372 U.S. 293, 317 (1963), the court held that newly discovered evidence claims are not cognizable in federal habeas corpus. J.A. 67. The court vacated the stay of execution and certificate of probable cause. J.A. 69.[7]

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[6] Initially, the court dismissed petitioner's *Brady* claim on the ground that there were insufficient facts to support it. J.A. 37-38. On reconsideration, the court granted a hearing on that claim and the actual innocence claim. J.A. 54-55.

[7] After the court of appeals vacated the stay, petitioner filed a rehearing petition to which he attached a new affidavit by Raul Jr. In it, Raul Jr. alleged that, during petitioner's trial, various law enforcement officers and the Hidalgo County sheriff, frightened that their drug trafficking would be exposed, came to his house; told Raul Sr. not to say what had happened the night of the shootings; and also threatened Raul Jr.'s family. Aff. of Raul Herrera, Jr., 2-3 (Feb. 17, 1992), attached to Petition for Rehearing (Feb. 19, 1992).

In the meantime, the district court dismissed without prejudice petitioner's actual innocence claim, so that he could present it to the state courts. (Texas courts will not consider a claim that is under consideration in a federal habeas corpus petition.) The state district court rejected petitioner's claim, finding that "[t]he newly related evidence, if it existed at the time of trial, was available to and discoverable by the defense through reasonable diligence." *Ex parte Herrera*, No. 81-CR-672-C (Tex. 197th Jud. Dist. Feb. 19, 1992), slip op. 1. The court also ruled that "[t]here are no material, previously unresolved issues of fact which are material to the legality of [petitioner's] conviction and sentence, and an evidentiary hearing is not required. [His] allegations do not provide a basis for relief under *Brady* v. *Maryland*, 373 U.S. 83 (1963)." Slip op. 1. Petitioner then filed a third habeas petition in federal court, to which Raul Jr.'s new affidavit was attached as Exhibit 21. Petition for a Writ of Habeas Corpus, *et al.* (Feb. 19, 1992).

Petitioner sought review in this Court. The Court granted the certiorari petition but denied a stay of execution. 112 S. Ct. 1074 (1992). The Texas courts later stayed petitioner's execution.

SUMMARY OF ARGUMENT

I. Petitioner claims that the Cruel and Unusual Punishments Clause bars his execution because he has a colorable claim of actual innocence. But that Clause only limits the penalty imposed on a convicted defendant; other clauses, such as the Due Process Clause, regulate the trial process. Because petitioner's claim goes to his conviction rather than his sentence, the Eighth Amendment is inapplicable.

II. Petitioner's claim is that the Due Process Clause requires that there be judicial review of a claim of actual innocence based on newly discovered evidence. But it is well established that the Clause does not guarantee a defendant the right to appeal a trial court judgment of conviction, let alone collaterally to challenge a conviction. If a State does allow a challenge to a conviction based on newly discovered evidence, nothing in the Due Process Clause bars the State from enforcing its time limit on judicial consideration of such challenges. Nor would a contrary rule benefit petitioner, since the affidavits he filed, viewed in light of the overwhelming proof of his guilt, would not require a rational jury to acquit him at a retrial.

ARGUMENT

THE COURT OF APPEALS CORRECTLY DENIED PETITIONER RELIEF ON HIS CLAIM OF NEWLY DISCOVERED EVIDENCE

Nearly three decades ago in *Townsend* v. *Sain*, 372 U.S. 293 (1963), Chief Justice Earl Warren, writing for the Court, explained that a habeas petitioner's claim of newly discovered evidence does not entitle him to relief unless he can link that evidence to a constitutional violation. In Chief Justice Warren's words, *id.* at 317 (emphasis added):

> Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; *the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.*

The question is whether the Court's statement in *Townsend* is still good law.[8] Put differently, does the Constitution require that a prisoner have the right to seek judicial review of a claim of newly discovered evidence, instead of being required to seek relief in the clemency process? In our view, the Constitution does not guarantee a prisoner such a right.

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[8] Since *Townsend*, the federal courts have held that a state prisoner cannot obtain habeas corpus relief based simply on a claim of newly discovered evidence. See, *e.g.*, *Boyd* v. *Puckett*, 905 F.2d 895 (5th Cir.), cert. denied, 111 S. Ct. 526 (1990); *Stockton* v. *Virginia*, 852 F.2d 740, 749 (4th Cir. 1988), cert. denied, 489 U.S. 1071 (1989); *Swindle* v. *Davis*, 846 F.2d 706 (11th Cir. 1988); *Walker* v. *Lockhart*, 763 F.2d 942, 960 (8th Cir. 1985) (en banc), cert. denied, 478 U.S. 1020 (1986). That rule applies in capital cases. See *Byrd* v. *Armontrout*, 880 F.2d 1, 8 (8th Cir. 1989), cert. denied, 494 U.S. 1019 (1990). The cases petitioner cites, Br. 39-40 n.52, involved recanted or allegedly perjurious testimony.

I. THE EIGHTH AMENDMENT DOES NOT REGULATE THE FACTFINDING PROCESS OF DETERMINING A DEFENDANT'S GUILT OR INNOCENCE

From the premise that the execution of an innocent person violates the Eighth Amendment, petitioner argues that the Eighth Amendment grants a prisoner the right to judicial relief from the death penalty based on newly discovered evidence of his innocence. Ironically, while petitioner contends that he did not kill Officer Carrisalez, petitioner does not challenge his conviction, only his sentence. As he puts it, Br. 39-40 n.52:

> Petitioner's challenge is to his unjust execution, not his conviction[.] * * * [A] remedy that may be unavailable to an imprisoned person may be available for a death sentenced inmate. * * * Petitioner is asserting that it violates the Eighth and Fourteenth Amendments to execute him because he is innocent.

Those statements illustrate the confusion in petitioner's theory. The gravamen of petitioner's claim is that newly discovered evidence shows that he did not murder Officer Carrisalez. If petitioner's theory and factual allegations are correct, petitioner should be asking for a new trial, not just a sentence less than death, because the newly discovered evidence would undermine the validity of his conviction. For that reason, the question presented is not limited to capital cases, as petitioner suggests. If a condemned prisoner can challenge his conviction due to newly discovered evidence, then so too can a prisoner serving a term of years.

That conclusion also affects the analysis of petitioner's claim. The Due Process Clause bars the government from punishing someone unless and until it has proved his guilt beyond a reasonable doubt in accordance with Fifth and Sixth Amendment guarantees. By contrast, the Eighth Amendment, as relevant here, assumes that a person has been validly convicted. Because petitioner's claim is ultimately that he is innocent, the Eighth Amendment has no application to this case.

1. The Eighth Amendment prohibits the imposition of "[e]xcessive bail," "excessive fines," and "cruel and unusual punishments." The text speaks to pretrial and post-trial matters, rather than to the trial itself. Other provisions of the Constitution regulate the process of a criminal trial. Article III, § 2, Cl. 3, guarantees a defendant the right to a jury trial in the State where the crime was committed, or where Congress directs, if the crime was committed outside the States. The Fifth and Sixth Amendments regulate trials in various ways. They require an indictment by a grand jury for a capital or "otherwise infamous crime" (generally any felony); notice of the charges; a speedy and public jury trial in the State and district where the offense was committed; the assistance of counsel, compulsory process, and confrontation at trial; as well as protection against twice being placed in jeopardy of life or limb for the same offense. These provisions, not the Cruel and Unusual Punishments Clause, regulate the trial process; the latter simply limits the punishment that can be imposed on someone who is validly convicted of a crime. If a person has not been validly convicted the question is not whether he is being punished consistent with the Eighth Amendment; he may not be punished at all.

2. The history of the Eighth Amendment is consistent with the evident meaning of the text. The phrase "cruel and unusual punishments" was used in the Bill of Rights of 1689, 1 Wm. & Mary, Sess. 2, ch. 2. While historians disagree over the precise events that triggered the adoption of that provision, they agree that it was directed against unauthorized and perhaps grossly disproportionate penalties. The Cruel and Unusual Punishments Clause was taken verbatim from the English Bill of Rights of 1689. It was likely adopted to meet complaints voiced in the state ratifying conventions that the Constitution did not limit the types of punishments that Congress could impose. See *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2687-2691 (1991) (opinion of Scalia, J.); *Gregg* v. *Georgia*, 428 U.S. 153, 169-170 n.17 (1976) (lead opinion); Granucci, "*Nor Cruel and Unusual Punishments Inflicted*": *The Original Meaning*, 57 Calif. L. Rev. 839 (1969). Thus, the history of the Clause reveals that it was designed to regulate the punishment that could be imposed on a person validly convicted of a crime, not the determination of guilt or innocence.

3. That conclusion is buttressed by the judicial interpretations of the Eighth Amendment and its state counterparts. State courts in the 19th century construed such provisions as prohibiting only certain types of punishment.[9] For example, the General Court of Virginia read Section 9 of the Virginia Declaration of Rights of 1776, the direct predecessor to the Cruel and Unusual Punishments Clause, as "merely applicable to the modes of punishment" and as "declaim[ing] against the wanton cruelty of many of the punishments practised in other countries." *Aldridge* v. *Commonwealth*, 4 Va. 447, 449-450 (1824). Such decisions did not construe state constitutional versions of the Eighth Amendment as regulating the trial or post-trial processes.

This Court's cases are similar. Initially, they involved the issue whether a particular mode of punishment, by its nature, was cruel and unusual and thus could never be imposed on a defendant convicted of any offense, however heinous.[10] More recently, the overwhelming majority of the Court's cases have focused on the process by

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[9] See, *e.g.*, *Commonwealth* v. *Hitchings*, 71 Mass. 482, 486 (1855); *Whitten* v. *State*, 47 Ga. 297, 301 (1872); *State* v. *Driver*, 78 N.C. 423 (1878); *Cummins* v. *People*, 42 Mich. 142, 3 N.W. 305 (1879); *State* v. *Williams*, 77 Mo. 310 (1883); *State* v. *White*, 44 Kan. 514, 516-521 (1890); *State* v. *Becker*, 3 S.D. 29, 51 N.W. 1018, 1022 (1892); *Hobbs* v. *State*, 133 Ind. 404, 408-410, 32 N.E. 1019, 1020-1021 (1893); *Garvey* v. *Whitaker*, 48 La. 527, 530-533, 19 So. 457, 458-459 (1896); *Jackson* v. *United States*, 102 F. 473 (9th Cir. 1900).

[10] *Francis* v. *Resweber*, 329 U.S. 459 (1947) (second attempt at electrocution after first effort failed); *In re Kemmler*, 136 U.S. 436 (1890) (electrocution); *Wilkerson* v. *Utah*, 99 U.S. 130 (1879) (firing squad).

which certain punishments (particularly the death penalty) must be administered.[11] Otherwise, the Court's decisions have focused on issues such as whether a particular sentence is excessive for a certain offense,[12] whether a particular sanction can be imposed or carried out on certain persons,[13] whether the State has exceeded the scope of the punishment that can be imposed on a prisoner,[14] and whether certain conduct can be subject to criminal punishment at all.[15] Those decisions do not grant a right to challenge the accuracy of the verdict of guilt or innocence on direct or collateral review.

II. THE DUE PROCESS CLAUSE DOES NOT GUARANTEE A PRISONER A JUDICIAL REMEDY FOR A CLAIM OF NEWLY DISCOVERED EVIDENCE

Petitioner addresses his argument to the wrong question. It is settled that the Constitution does not allow an innocent person to be executed; the Due Process Clause prohibits government from punishing someone unless and until it has proved his guilt beyond a reasonable doubt at a criminal trial in accordance with relevant constitutional guarantees. *Bell* v. *Wolfish*, 441 U.S. 520, 535-536 & n.16 (1979). The State, however, has satisfied that requirement; it proved petitioner's guilt at a trial

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[11] *E.g.*, *Harmelin*, 111 S. Ct. at 2702 (mandatory sentences); *Blystone* v. *Pennsylvania*, 494 U.S. 299 (1990), and *Furman* v. *Georgia*, 408 U.S. 238 (1972) (death penalty).

[12] *E.g.*, *Harmelin*; *Tison* v. *Arizona*, 481 U.S. 137 (1987); *Coker* v. *Georgia*, 433 U.S. 584 (1977); *Gregg* v. *Georgia*, 428 U.S. 153 (1976).

[13] *E.g.*, *Stanford* v. *Kentucky*, 492 U.S. 361 (1989); *Penry* v. *Lynaugh*, 492 U.S. 302 (1989); *Ford* v. *Wainwright*, 477 U.S. 399 (1986).

[14] *E.g.*, *Hudson* v. *McMillian*, 112 S. Ct. 995 (1992); *Estelle* v. *Gamble*, 429 U.S. 97 (1976).

[15] *Powell* v. *Texas*, 392 U.S. 514 (1968); *Robinson* v. *California*, 370 U.S. 660 (1962).

that is not under challenge, so petitioner is no longer "innocent." For that reason, the question is not whether the Constitution bars the punishment of an innocent person, but whether it requires a State to establish a judicial, post-conviction mechanism for entertaining a prisoner's challenge to his conviction on the basis of newly discovered evidence. In our view, it does not.

A. Due Process Does Not Require That Judicial Review Be Available For A Claim Of Newly Discovered Evidence

Petitioner challenges his sentence on the ground that he is innocent of the crime, not on the ground that a specific constitutional provision was violated at his trial. The only constitutional provision that could be relevant to such a claim is the Due Process Clause; the issue therefore ultimately reduces to whether that Clause guarantees petitioner relief on his claim of newly discovered evidence. In our view, due process does not entitle a prisoner to a judicial remedy for newly discovered evidence. Even if it did, however, a State can fix a reasonable time limit for such motions.

1. *A State need not provide a judicial forum for resolution of a claim of newly discovered evidence*

a. Several provisions of the Constitution regulate the trial process and therefore contemplate that a defendant must be tried before he can be punished. By contrast, the Constitution nowhere contains a right to take an appeal from a judgment of conviction, or to seek a new trial on any ground, legal or factual. The only relevant provision is the Suspension Clause, which refers to "[t]he Privilege of the Writ of Habeas Corpus," Art. I, § 9, Cl. 2. But the writ mentioned in that Clause was merely a means of preventing improper executive detention of persons who had not been convicted of any crime. The Suspension Clause did not require the federal and state governments

to establish appellate or post-conviction mechanisms as part of the criminal process, nor did it envision that federal courts in habeas corpus proceedings would entertain challenges to state court criminal judgments.[16]

b. Thus, the Court has long held that a defendant does not have a constitutional right to appeal his conviction or sentence to a state appellate tribunal. The Court first stated that principle nearly a century ago in *McKane* v. *Durston*, 153 U.S. 684, 687-688 (1894). In ruling that the defendant was not unconstitutionally denied bail pending appeal of his conviction, the first Justice Harlan wrote:

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such review. A citation of authorities upon the point is unnecessary.
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> It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper. * * * [W]hether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself.

Shortly after *McKane* was decided, the Court applied that rule in a capital case, *Andrews* v. *Swartz*, 156 U.S. 272 (1895). There, a state law granted a convicted de-

[16] See *Swain* v. *Pressley*, 430 U.S. 372, 384-386 (1977) (opinion of Burger, C.J.); *Stone* v. *Powell*, 428 U.S. 465, 474-475 (1976); *United States* v. *MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion) (dictum); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 170 (1970). Not until well into this century did plenary federal review of state court convictions become a commonplace feature of habeas corpus. See generally *Wainwright* v. *Sykes*, 433 U.S. 72, 79 (1977).

fendant a right of appeal in non-capital cases, but made appeal discretionary in capital cases. The defendant was convicted of murder and sentenced to death. When his application to appeal was denied, he sought review in this Court, contending that the state law was unconstitutional. Citing *McKane*, this Court rejected that claim. 156 U.S. at 274-275. This Court also noted that a defendant can always seek review of a *federal* claim in this Court in order to challenge his conviction. *Id.* at 276; see also *Bergemann* v. *Backer*, 157 U.S. 655, 659 (1895) (rejecting similar claim in a capital case); *Ex parte Gordon*, 66 U.S. (1 Black) 503 (1862) (no right to appeal unless authorized by statute even in a capital case).

The rule articulated in *McKane* and applied in *Andrews* is still valid today. This Court has frequently reiterated the proposition that the Due Process Clause guarantees a defendant the right to a fair trial, not a right to challenge the trial court's judgment of conviction on appeal.[17] Relying on that principle, the Court has recently made clear that the States have no constitutional obligation to

[17] See *Bergemann* v. *Backer*, 157 U.S. 655, 659 (1895); *Kohl* v. *Lehlback*, 160 U.S. 293, 297, 299 (1895); *Murphy* v. *Massachusetts*, 177 U.S. 155, 158 (1900); *Reetz* v. *Michigan*, 188 U.S. 505, 508 (1903); *Frank* v. *Mangum*, 237 U.S. 309, 327 (1915); *Luckenbach S.S. Co.* v. *United States*, 272 U.S. 533, 536 (1926); *Ohio* v. *Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930); *Willis* v. *Tennessee*, 296 U.S. 533 (1935); *District of Columbia* v. *Clawans*, 300 U.S. 617, 627 (1937); *Carter* v. *Illinois*, 329 U.S. 173, 175 (1946); *Brown* v. *Allen*, 344 U.S. 443, 486 n.36 (1953); *National Union of Marine Cooks & Stewards* v. *Arnold*, 348 U.S. 37, 42 n.6 (1954); *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion); *id.* at 21 (Frankfurter, J., concurring in the judgment); *Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972); *Ortwein* v. *Schwab*, 410 U.S. 656, 660 (1973); *Ross* v. *Moffitt*, 417 U.S. 600, 606, 611 (1974); *Estelle* v. *Dorrough*, 420 U.S. 534, 536 (1975); *United States* v. *MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion); *Abney* v. *United States*, 431 U.S. 651, 656 (1977); *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985); *Pennsylvania* v. *Finley*, 481 U.S. 551, 555-556 (1987); *Murray* v. *Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion).

establish post-conviction judicial remedies for convicted defendants. See *Murray* v. *Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion); *Pennsylvania* v. *Finley*, 481 U.S. 551, 555-556 (1987).

The rationale of *McKane* and *Andrews* is also still valid. The Due Process Clause embodies what the Court has termed "the inherent right of defence," but does not include a right "to review a judgment by way of error or appeal," which instead is a matter of "grace or favor." *National Union of Marine Cooks & Stewards* v. *Arnold*, 348 U.S. 37, 42 n.6 (1954) (quoting *Hovey* v. *Elliott*, 167 U.S. 409, 443 (1897)). Of course, "[c]ourts do make mistakes," *Willy* v. *Coastal Corp.*, 112 S. Ct. 1076, 1081 (1992). Congress and state legislatures thus have chosen to authorize direct appeal in criminal cases. But that now-universal practice does not mean that due process requires such review, and it certainly does not require a State to adopt a post-conviction mechanism to avoid any possibility of error. See *Medina* v. *California*, No. 90-8370 (June 22, 1992), slip op. 13 (quoting *Patterson* v. *New York*, 432 U.S. 197, 208 (1977)) ("Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."). Moreover, a defendant can seek relief in this Court if he claims that the state courts violated his federal rights. *Andrews* v. *Swartz*, 156 U.S. at 276. A defendant convicted in state court therefore always has an opportunity to seek judicial review of a federal claim.

c. Petitioner relies on several cases in which the Court has discussed the concept of "actual innocence" in connection with the habeas corpus process. The Court has said that a prisoner who has forfeited his right to seek relief on habeas corpus due to a procedural default in the state courts or an abuse of the writ under 28 U.S.C. 2244(b) can still obtain relief if he can establish his "actual innocence." See *Sawyer* v. *Whitley*, *supra*; *McCleskey* v. *Zant*, 111 S. Ct. at 1471-1474; *Smith* v. *Murray*, 477 U.S. 527, 537-538 (1986); *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986); *Kuhlmann* v. *Wilson*, 477 U.S. 436, 454 (1986) (plurality opinion). Those cases do not aid petitioner, however, since they rest on the principle that the federal courts can invoke their "equitable discretion" in habeas corpus to excuse procedural defaults in order to ensure that a *federal constitutional error* does not lead to the conviction of an innocent person. *McCleskey*, 111 S. Ct. at 1474. By contrast, petitioner does not seek to excuse his failure properly to preserve a claim of legal error on the ground that he is innocent. Rather, his claim is that, even if the verdict was not infected by constitutional error, or indeed, any *legal* error at all, that verdict is factually inaccurate, as new evidence reveals. That difference is significant. Federal courts have discretion to excuse procedural default rules that this Court itself has developed, but federal courts lack supervisory power over state courts and cannot vacate a state conviction absent a constitutional violation. *Smith* v. *Phillips*, 455 U.S. 209, 221 (1982). The equitable power recognized in cases such as *McCleskey* and *Murray* therefore does not extend nearly as far as petitioner's argument demands.

The closest decision by this Court is *Jackson* v. *Virginia*, 443 U.S. 307 (1979). *Jackson* held that due process requires the State to prove a defendant's guilt by evidence sufficient to persuade a rational trier of fact beyond a reasonable doubt of every element of the charged offense, and that federal courts can review the sufficiency of the evidence on habeas corpus. Yet *Jackson* does not help petitioner, for two related reasons.

First, judicial review of the sufficiency of the evidence is limited to the record. *Jackson*, 443 U.S. at 319. By definition, then, the due process principle adopted in *Jackson* does not extend to later discovered evidence. Second and more importantly, the review contemplated by *Jackson* is not to determine whether the trier of fact has made the *correct* decision; it only forbids the trier

of fact from making an *irrational* decision. The standard of review that *Jackson* adopted illustrates that point. The inquiry into the sufficiency of the evidence, *Jackson* stated, "does not require a court to ask itself whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 318-319 (citation and punctuation omitted). That principle does not aid petitioner, since in light of the evidence at trial, the jury's verdict surely is not irrational.

d. Executive clemency is a traditional remedy for claims of legal or factual error. The authority of a state governor to grant a pardon, commutation, or reprieve is neither granted nor withheld by the Constitution, *Rogers* v. *Peck*, 199 U.S. 425, 436 (1905); *Storti* v. *Massachusetts*, 183 U.S. 138, 142 (1901), and Texas law appears to authorize the governor to exercise clemency for any reason. See Tex. Const. Ann. art. IV, § 11 (Vernon 1984); Tex. Code Crim. Proc. Ann. art. 4801 (Vernon 1979); *Stanley* v. *State*, 490 S.W.2d 828, 834 (Tex. Crim. App. 1972). As the Fifth Circuit once wrote, "[d]ue process requires no more than compliance with the orderly procedures long established in our law to assure fundamental fairness in criminal prosecutions. Executive clemency is the last link in the chain." *Shaver* v. *Ellis*, 255 F.2d 509, 511 (1958).[18]

[18] There is no reason to fear that there is a significant risk that an innocent person will be executed under the procedures that the States have in place. Although one study asserted that 23 innocent persons have been executed in this century, see Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21 (1987), that study is seriously flawed in numerous respects, see Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 Stan. L. Rev. 121 (1988). The direct review and collateral procedures that the federal government and the States have in place are more than ample to separate the guilty from the innocent. Given those procedures, channeling untimely allegations of newly discovered evidence to executive clemency is a reasonable way to ensure that an innocent person is neither executed nor imprisoned.

As noted below, a defendant convicted in federal court can seek relief on a claim of newly discovered evidence only within two years after his conviction becomes final. After that point, the prisoner must seek relief from the President, even if new facts prove his innocence. The Pardon Clause, Art. II, § 2, Cl. 1, authorizes the President to pardon a prisoner or to commute a capital sentence to any term of years, for any reason. See *Schick* v. *Reed*, 419 U.S. 256 (1974); *Ex parte Wells*, 59 U.S. (18 How.) 307 (1856).

It is reasonable for a State to channel untimely claims of newly discovered evidence to the clemency process, rather than a judicial proceeding. Repetitive challenges to a prisoner's capital sentence have now become the norm in capital cases,[19] and such actions often are filed shortly before a prisoner is scheduled to be executed.[20] The clemency process allows a State to enjoy the flexibility necessary to ensure that a potentially valid claim of innocence can be carefully analyzed, while also ensuring that the State's laws are not frustrated. By contrast, the potential for abuse of the writ if petitioner's submission were accepted is evident. All that a prisoner need allege to obtain a stay of his execution and an evidentiary hearing is that a new witness recently surfaced or some new medical evidence has recently come to light that casts some doubt on his guilt. A manufactured claim of inno-

[19] *E.g.*, *Vasquez* v. *Harris*, 112 S. Ct. 1713 (1992), and *Gomez* v. *United States District Court*, 112 S. Ct. 1652 (1992) (fifth action for relief by condemned prisoner); *In re Blodgett*, 112 S. Ct. 674 (1992) (three habeas petitions by condemned prisoner); *Delo* v. *Stokes*, 495 U.S. 320 (1990) (fourth habeas petition by condemned prisoner).

[20] See *Sawyer* v. *Whitley*, slip op. 6-7 & n.7; *Woodard* v. *Hutchins*, 464 U.S. 377, 380 (1984).

cence cannot be dismissed summarily, which enables a condemned prisoner to delay his execution, perhaps several times. And there is no likelihood that the risk of being held in contempt or prosecuted for perjury could possibly deter a condemned inmate from filing a frivolous or fraudulent claim of innocence. Cf. *Illinois* v. *Allen*, 397 U.S. 337, 345 (1970). These considerations show why a State could reasonably decide that the historical practice of using clemency as a safety valve fairly accommodates the competing interests.[21]

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[21] Relying on the plurality opinion in *Ford* v. *Wainwright*, 477 U.S. 399, 416 (1986), petitioner argues that clemency is an inadequate safeguard. Br. 47 n.53. Petitioner's claim is unpersuasive. While it would be unreasonable to tell a prisoner that he can claim incompetency (the issue in *Ford*) only if it arises within 30 days of sentencing, it is not unreasonable to treat differently claims of newly discovered evidence, for the reasons stated in the text. It also is immaterial that the clemency remedy is before an elected official in the State's executive branch, rather than in a court. Federal separation of powers principles do not apply to the States, so States are free to allocate decisionmaking authority to whatever branch of government they choose. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) (collecting cases). And Texas, like many other States, has an elected judiciary. See *Houston Lawyers' Ass'n* v. *Texas Attorney General*, 111 S. Ct. 2376 (1991).

Although the governor's clemency decision would not be subject to judicial review, that fact should not prevent a State from using clemency as a safety valve. In the federal system, the President's decision whether to exercise clemency is not subject to judicial review because, in the words of *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), the Pardon Clause is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." Cf. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867); *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 148 (1872); *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 485 (1989) (opinion of Kennedy, J.) (Congress cannot limit a pardon); see generally *Schick* v. *Reed*, 419 U.S. 256, 266 (1974); compare *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458 (1981) (due process does not regulate clemency). If, as explained below, federal law, including the Constitution, requires that a federal prisoner in petitioner's shoes seek relief from the President and entrusts the President with the final say over this matter, due process should not impose a greater obligation on the States. They, too, should be free to use executive clemency as the safety valve protecting against a miscarriage of justice.

2. *A State can set a time limit for presenting to a court a claim of newly discovered evidence*

a. By statute, federal courts have long had power to grant defendants a new trial.[22] Originally, however, a court could do so only if it acted (or a proceeding was begun) during the term of court in which a final judgment was entered. Otherwise, a court had jurisdiction only to correct a clerical mistake. *United States* v. *Mayer*, 235 U.S. 55, 67-68 (1914); *Howell* v. *United States*, 172 F.2d 213, 215-216 (4th Cir.), cert. denied, 337 U.S. 906 (1949). In 1934, this Court departed from the common law rule in favor of a specific time limitation. Rule 2(3) of the Criminal Appeals Rules authorized district courts to grant a defendant a new trial on the ground of newly discovered evidence if he filed such a motion within 60 days after the judgment became final. Rule 2(3), 292 U.S. 659, 662 (1934). Four years later, the Court modified the Rule to allow a newly discovered evidence motion to be filed in a capital case at any time before the prisoner was executed. Rule 2(3), 304 U.S. 592, 592 (1938) (codified at 18 U.S.C. 688 (1940)).

Early in the 1940s, there was debate in the legal community over whether to abolish the time limit for new trial motions based on newly discovered evidence in order to prevent a miscarriage of justice, or to retain some

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[22] New trials were a rarity in England in 1789. Common law courts had authority to grant a new trial in misdemeanor cases, where it was sparingly used, but not in felony cases. Orfield, *New Trial in Federal Criminal Cases*, 2 Villanova L. Rev. 293 (1957); Riddell, *New Trial in Present Practice*, 27 Yale L.J. 353, 355 (1918); Riddell, *New Trial at the Common Law*, 26 Yale L.J. 49, 57-60 (1916). The First Congress authorized federal courts to grant new trials for "reasons for which new trials have usually been granted in courts of law," Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83 (Judiciary Act of 1789), even in felony cases. See *Sparf* v. *United States*, 156 U.S. 51, 175 (1895) (Gray & Shiras, JJ., dissenting) (collecting early cases); Orfield, 2 Villanova L. Rev. at 306 & nn.29-31.

time limit in order to promote finality. Orfield, *New Trial in Federal Criminal Cases*, 2 Villanova L. Rev. 293, 296-299 (1957). The Federal Rules Advisory Committee and Attorney General Cummings advocated eliminating any time limit.[23] That view, however, did not prevail; to the contrary, the Court set a two-year time limit in new Fed. R. Crim. P. 33 and abolished the special exception for capital cases. 327 U.S. 821, 855-856 (1944).

Rule 33 has changed little since its adoption. A new trial motion based on newly discovered evidence must still be filed within two years of final judgment. Rule 45(b) also states clearly that a court "may not extend the time for taking any action under Rule[] * * * 33 * * * except to the extent and under the conditions stated in" it, and Rule 33 contains no exception to the two-year limitation. The courts also have strictly construed Rule 33. For example, in *United States* v. *Smith*, 331 U.S. 469 (1947), this Court held that Rules 33 and 45 barred a district court from granting a new trial beyond the then-applicable five-day limit for motions on grounds other than newly discovered evidence. That rationale also applies to the requirement that a new trial motion based on newly discovered evidence must be filed within two years after entry of final judgment. See *United States* v. *Robinson*, 361 U.S. 220 (1960) (strictly construing Rule 45(b) while noting that it bars enlarging time for filing a Rule 33 motion). The lower courts also have uniformly

[23] See 1942 Advisory Committee, Federal Rules of Criminal Procedure, *Federal Rules: Preliminary Draft* 102, *reprinted in* 1 M. Wilken & N. Triffin, *Drafting History of the Federal Rules of Criminal Procedure* 102, 134 (1991) [hereinafter *Drafting History*] (draft of Rule 48(c) on new trials); 1942 Advisory Committee, *Federal Rules: Preliminary Draft* 134, *reprinted in* 1 *Drafting History* (draft of Rule 31(c) on new trials); 1944 Advisory Committee, *Federal Rules: Second Preliminary Draft* 129, *reprinted in* 4 *Drafting History* 129 (draft of Rule 35 on new trials); 1944 Advisory Committee, *Federal Rules* 34-35, *reprinted in* 7 Drafting *History* 54-55 (proposed Rule 35 on new trials); Barron, *Proposed Rules of Procedure in Criminal Cases*, 2 F.R.D. 211, 218 (1941); Cummings, *The Third Great Adventure*, 3 F.R.D. 283, 287 (1943).

ruled that the Rule 33 time limits are mandatory and that a district court lacks jurisdiction to consider an untimely motion.[24] There is also no exception to that requirement. Even under the harshest of circumstances, where a defendant's innocence seems manifest, an untimely motion cannot be entertained. Clemency is the available recourse. *E.g.*, *United States* v. *Kaplan*, 101 F. Supp. 7 (S.D.N.Y. 1951) (Weinfeld, J.).[25]

b. Texas law permits a defendant to obtain a new trial based on newly discovered evidence, but requires that a motion be filed within 30 days of imposition or suspension of sentence in open court. Tex. R. App. P. 31 (a)(1). Texas courts will not consider an untimely motion.[26] Petitioner thus could have sought relief in the Texas courts if he had obtained the affidavits sooner.

[24] See, *e.g.*, *United States* v. *Spector*, 888 F.2d 583, 584 (8th Cir. 1989); *United States* v. *Cook*, 705 F.2d 350, 351 (9th Cir. 1983); *United States* v. *Cody*, 529 F.2d 564, 565-566 (8th Cir. 1976); *Howell* v. *United States*, 172 F.2d at 215-216; *United States* v. *Kaplan*, 101 F. Supp. 7 (S.D.N.Y. 1951). The commentators agree. See 8A J. Moore et al., *Moore's Federal Practice* ¶ 33.03[2] (2d ed. 1992); 3 C. Wright, *Federal Practice and Procedure* § 558 (2d ed. 1982).

[25] Chief Justice Stone made this point in transmitting to the Rules Advisory Committee matters that this Court believed should be considered by the committee. 7 *Drafting History* 7 (letter from Chief Justice Stone to Advisory Committee Chairman Arthur Vanderbilt: "It is suggested that there should be a definite time limit within which motions for a new trial based on newly discovered evidence should be made, unless the trial court in its discretion, for good cause shown, allows the motion to be filed. Is it not desirable that at some point of time further consideration of criminal cases by the court should be at an end, after which appeals should be made to Executive clemency alone?"). See also *Howell* v. *United States*, 172 F.2d at 216.

[26] See *Beathard* v. *State*, 767 S.W.2d 423, 433 (Tex. Crim. App. 1989); *Drew* v. *State*, 743 S.W.2d 207, 222-223 (Tex. Crim. App. 1987); *Duggard* v. *State*, 688 S.W.2d 524, 528 (Tex. Crim. App. 1985), overruled on other grounds, *Williams* v. *State*, 780 S.W.2d 802 (Tex. Crim. App. 1989) (all construing predecessor to Tex. R. App. P. 31(a)(1)); 25 Texas Jur. 3d *Newly Discovered Evidence*

Petitioner implies that the 30-day limit imposed by Tex. R. App. P. 31(a)(1) is unconstitutional. Br. 38. But petitioner could not prevail had he been convicted in federal court, since his conviction became final more than six years before he filed his second habeas petition. Petitioner also could not obtain relief in at least 34 other States and the District of Columbia.[27] Given this widespread judgment that some time period is necessary, the fact that the Constitution supplies no objective standard for preferring one time period over another, and the principle that due process does not require any post-conviction judicial review, the judgment made by Texas cannot be deemed unconstitutional.

B. Petitioner Cannot Establish His Innocence

Even if petitioner were correct that the Constitution bars Texas from enforcing its time limit on judicial consideration of newly discovered evidence claims, the result in this case would not be different. Under the common law test prevailing in Texas, the other States, and

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§ 3532, at 43 (Supp. 1992). But see *Callis* v. *State*, 756 S.W.2d 826, 827-828 (Tex. App. 1st Dist. 1988) (ruling that the "good cause" provision of Tex. R. App. P. 2(b) can be used to suspend the 30-day requirement of Tex. R. App. P. 31(a)(1) if the constitution so requires; suspending the requirement because the defendant lacked counsel). A defendant cannot raise a claim of newly discovered evidence on collateral attack; he must do so on direct appeal. *Ex parte May*, 717 S.W.2d 84, 88 (Tex. Crim. App. 1986); *Ex parte Binder*, 660 S.W.2d 103, 104-106 (Tex. Crim. App. 1983).

[27] Texas is one of 16 States that require a new trial motion based on a claim of newly discovered evidence to be filed within 60 days after judgment. One State requires that a motion be filed during the term in which judgment is rendered. Five States have one-year time limits. Ten States and the District of Columbia have two-year time limits. Three States have a three-year limit. Only 15 States permit a new trial motion to be filed more than three years after conviction. Of that number, four States have time limits of less than 120 days, but allow those limits to be waived. One State has a one-year time limit that can be waived, and another has a two-year limit that can be waived. Nine States allow a convict to file a newly discovered evidence claim at any time. For the Court's convenience, the relevant laws are collected at App. A, *infra*.

the federal system, relief may be granted on the basis of newly discovered evidence only if: (1) The evidence is in fact newly discovered and was unknown to the defendant at the time of trial; (2) the defendant's failure to learn of the evidence before trial was not due to a lack of due diligence; (3) the evidence is material to the issues at trial, rather than merely cumulative or impeaching; and (4) the new evidence probably would produce an acquittal at a retrial.[28] Last Term, in *Sawyer* v. *Whitley* —a case involving a claim that the prisoner was "actually innocent" of his death sentence—this Court held that the prisoner "must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." Slip op. 1.

According to the state trial court and the Texas Court of Criminal Appeals, the proof of petitioner's guilt was "overwhelming." What is more, those courts found "no evidence at trial remotely suggesting that anyone other than [petitioner] committed the offense." 682 S.W.2d at 320; 819 S.W. 2d at 528; J.A. 10. Officer Carrisalez and Enrique Hernandez both identified petitioner as the murderer, and the Texas Court of Criminal Appeals found Hernandez "unwavering in his in-court identification" of petitioner. 682 S.W.2d at 317. Petitioner also wrote a

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[28] See 8A J. Moore *et al.*, *supra*, ¶ 33.03[1], at 33-20 to 33-22; 3 C. Wright, *supra*, § 557, at 315-337; 25 Texas Jur. 3d *Newly Discovered Evidence* §§ 3487-3498 (1983); *e.g.*, *United States* v. *Tucker*, 836 F.2d 334, 336 (7th Cir.), cert. denied, 488 U.S. 855 (1988); *United States* v. *Miliet*, 804 F.2d 853, 859 (5th Cir. 1986); *Drew* v. *State*, 743 S.W.2d 207, 226 (Tex. Crim. App. 1987) (collecting cases); *Whitmore* v. *State*, 570 S.W.2d 889, 896 (Tex. Crim. App. 1976). This Court has often spoken approvingly of that standard, especially the last part. See *Boyde* v. *California*, 494 U.S. 370, 380-381 n.4 (1990); *INS* v. *Abudu*, 485 U.S. 94, 107 n.12 (1988); *United States* v. *Agurs*, 427 U.S. 97, 111 & n.19 (1976); *Mesarosh* v. *United States*, 352 U.S. 1, 9 (1956); *United States* v. *Johnson*, 327 U.S. 106, 110 n.4 (1946). The standard is often traced to the opinion of the Georgia Supreme Court more than a century ago in *Berry* v. *State*, 10 Ga. 511 (1851). See, *e.g.*, *Johnson*, 327 U.S. at 110 n.4.

letter in which he "essentially admit[ted]" killing the officers. *Ibid.*; 904 F.2d at 949 n.6. In sum, when viewed as a whole and in the light most favorable to the State, see *Jackson*, 443 U.S. at 319; *Wright* v. *West*, slip op. 18 (plurality opinion); *id.* at 6-7 n.3 (Souter, J., concurring in the judgment), the evidence powerfully established petitioner's guilt.

Petitioner's affidavits do not undermine that verdict. Whatever the merit of petitioner's claim that Officer Rucker was involved in drug trafficking, petitioner does not allege that Officer Carrisalez was so involved; Carrisalez just happened to be in the wrong place at the wrong time. Moreover, petitioner's claim rests on uncorroborated hearsay; one affidavit was submitted by a relative of petitioner's who is presently incarcerated; and the affiants' statements were not made under circumstances establishing their reliability. Compare Fed. R. Evid. 804 (b)(3). Finally, petitioner's failure to present this proof at an earlier stage of the process justifies skepticism. See *Taylor* v. *Illinois*, 484 U.S. 400, 414 (1988).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

JULY 1992

APPENDIX A

State Time Limits on the Filing of New Trial Motions Based on Claims of Newly Discovered Evidence

State	Statutory Provision or Rule and Time Limit
Alabama	Ala. Code § 15-17-5 (1982): 30 days
Alaska	Alaska R. Ct., Crim. R. 33 (1991): 2 years
Arizona	Ariz. R. Crim. P. 24.2(a)(2) (1990): 60 days
Arkansas	Ark. R. Crim. P. 36.22 (1989): 30 days
California	Cal. Penal Code, tit. 7, § 1502 (1985): no time limit
Colorado	Col. R. Crim. P. 33 (1992): no time limit
Connecticut	Conn. Gen. Stat. Ann. §§ 52-270, 52-582; Conn. R. Super. Ct., Crim. Cases, § 904 (1992): 3 years
Delaware	Del. Super. Ct. Crim. R. 33 (1992): 2 years
District of Columbia	D.C. Super. Ct. Crim. R. 33 (1991): 2 years
Florida	Fla. R. Ct., Crim. P., R. 3.590 (1992): 10 days
Georgia	Ga. Code Ann. §§ 5-5-40, 5-5-41 (1982): 30 days, can be extended
Hawaii	Haw. R. Penal P. 33 (1989): 10 days
Idaho	Idaho Code § 19-2407 (Supp. 1991): 10 days, can be extended
Illinois	Ill. Ann. Stat. para. 116-1 (1990): 30 days
Indiana	Ind. R. Crim. P. 16 (1992): 30 days
Iowa	Iowa Code § 813.2, R. Crim. P. 23 (1979): 2 years, can be waived
Kansas	Kan. Stat. Ann. § 22-3501 (1988): 2 years
Kentucky	Ky. R. Crim. P. 10.06 (1991): 1 year, can be waived
Louisiana	La. Code Crim. Proc. Ann. art. 853 (West 1991): 1 year
Maine	Maine R. Crim. P. 33 (1991): 2 years
Maryland	Md. Ann. Code, Crim. R. 4-331 (1992): 1 year
Massachusetts	Mass. R. Crim. P. 30 (1979): no time limit
Michigan	Mich. Ct. R. Crim. P. 6.431(A)(1) (1989): 42 days

State	Statutory Provision or Rule and Time Limit
Minnesota	Minn. R. Crim. P. 26.04 (1992) : 15 days
Mississippi	Miss. Crim. R. 5.16 (1991) : motion must be made within term that judgment is issued
Missouri	Mo. R. Crim. P. 29.11 (1992) : 15-25 days
Montana	Mont. Code Ann. § 46-16-702 (1989) : 30 days
Nebraska	Neb. Rev. Stat. § 29-2103 (1985) : 3 years
Nevada	Nev. Rev. Stat. § 176.515 (1986) : 2 years
New Hampshire	N.H. Rev. Stat. Ann. § 526:4 (1974) : 3 years
New Jersey	N.J. R. Crim. Prac. 3:20-2 (1992) : no time limit
New Mexico	N.M. R. Crim. P. 5-614 (1986) : 2 years
New York	N.Y. Crim. Proc. Law § 440.10 (McKinney 1983) : no time limit
North Carolina	N.C. Gen. Stat. § 15A-1415 (1991) : no time limit
North Dakota	N.D. R. Crim. P. 33 (1990) : 2 years
Ohio	Ohio R. Crim. P. 33 (1987) : 120 days, can be waived
Oklahoma	Okla. Ct. R., ch. 15, § 953 (1992) : 1 year
Oregon	Or. Rev. Stat. Ann. tit. 14, § 136.535 (1990) : 5 days, can be waived
Pennsylvania	Pa. R. Crim. P. 1123(d) (1989) : no time limit
Rhode Island	R.I. Super. Ct. R. Crim. P. 33 (1989) : 2 years
South Carolina	S.C. R. Crim. P. 29(b) (1991) : no time limit
South Dakota	S.D. Codified Laws ch. 23A-29-1, R. 33 (1988) : 10 days
Tennessee	Tenn. R. Crim. P. 33 (1990) : 30 days
Texas	Tex. R. App. P. 31 (1986) : 30 days
Utah	Utah R. Crim. P. 24 (1990) : 10 days
Vermont	Vt. R. Crim. P. 33 (1983) : 2 years
Virginia	Va. Sup. Ct. R. 3A:15 (1991) : 21 days
Washington	Wash. Crim. R. 7.8(b) (1992) : 1 year
West Virginia	W. Va. R. Crim. P. 33 (1991) : no time limit
Wisconsin	Wis. Stat. Ann. § 809.30(2)(b) (West 1991) : 20 days
Wyoming	Wyo. R. Crim. P. 34(b) (1991) : 2 years

APPENDIX B

The letter written by petitioner and found on him at the time of his arrest, State's Exh. 76A-76G, reads as follows, Respondent's Opposition to Request for Stay of Execution *et al.* 6-7 (Feb. 16, 1992) :

> To whom it may concern: I am terribly sorry for those I have brought grief to their lives. Who knows why? We cannot change the future's problems with problems from the past. What I did was for a cause and purpose. One law runs others, and in the world we live in, that's the way it is.
>
> I'm not a tormented person. I am sane in every way. My military life has nothing to do with this. We are all out here to service one way other and other [*sic*]. I believe in the law. What would it be without this men that risk their lives for others, and that's what they should be doing—protecting life, property, and the pursuit of happiness. Sometimes, the law gets too involved with other things that profit them. The most laws that they make for people to break them, in other words, to encourage crime.
>
> What happened to Rucker was for a certain reason. I knew him as Mike Tatum. He was in my business, and he violated some of its laws and suffered the penalty, like the one you have for me when the time comes.
>
> My personal life, which has been a conspiracy since my high school days, has nothing to do with what has happened. The other officer that became part of our lives, me and Rucker's (Tatum), that night had not to do in this [*sic*]. He was out to do what he had to do, protect, but that's life. There's a lot of us that wear different faces in lives every day, and that is what causes problems for all. [Unintelligible word].

You have wrote all you want of my life, but think about yours, also. [Signed Leonel Herrera]

I have tapes and pictures to prove what I have said. I will prove my side if you accept to listen. You [unintelligible word] freedom of speech, even a criminal has that right. I will present myself if this is read word for word over the media, I will turn myself in; if not, don't have millions of men out there working just on me while others—robbers, rapists, or burglars—are taking advantage of the law's time. Excuse my spelling and writing. It's hard at times like this.

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